

Roman v Air & Liquid Sys. Corp.
2012 NY Slip Op 31922(U)
July 12, 2012
Supreme Court, New York County
Docket Number: 190262/11
Judge: Sherry Klein Heitler
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SUPREME COURT OF THE STATE OF NEW YORK — NEW YORK COUNTY

PRESENT: SHERRY KLEIN HEITLER
Justice

PART 30

ROBERTO ROMAN and TRUDY ROMAN,

INDEX NO. 190262/11

MOTION DATE _____

PlaintiffS,

- v -

MOTION SEQ. NO. 002

AIR & LIQUID SYSTEMS CORP., et al.,

MOTION CAL. NO. _____

Defendants.

The following papers, numbered 1 to _____ were read on this motion to/for _____

	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	_____
Answering Affidavits — Exhibits _____	_____
Replying Affidavits _____	_____

Cross-Motion: Yes No

Upon the foregoing, it is ordered that this motion is decided in accordance with the memorandum decision dated 3/2/12

Dated: 3/2/12

SHERRY KLEIN HEITLER J.S.C.

Check one: FINAL DISPOSITION NON-FINAL DISPOSITION
Check if appropriate: DO NOT POST

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: PART 30

----- X
ROBERTO ROMAN and TRUDY ROMAN,

Index No. 190262/11
Motion Seq. 002

Plaintiffs,

DECISION & ORDER

- against -

AIR & LIQUID SYSTEMS CORP., *et. al*,

Defendants.

----- X

SHERRY KLEIN HEITLER, J.:

In this asbestos personal injury action, defendant Taco, Inc., (“Taco”) moves pursuant to CPLR 3212 for summary judgment dismissing the complaint and all cross-claims asserted against it. For the reasons set forth below, the motion is denied.

BACKGROUND

This action was commenced by plaintiffs Roberto Roman and Trudy Roman to recover for personal injuries allegedly caused by Mr. Roman’s exposure to, among other things, asbestos-containing pumps, valves, and boilers. Mr. Roman served in the United States Navy from 1964 until 1969. In his interrogatory responses, Mr. Roman provides that he was exposed to asbestos-containing pumps manufactured by defendant Taco while working as a boiler technician and stationary fireman. Mr. Roman was deposed over the course of seven days between August 22, 2011 and October 19, 2011.¹ At his deposition, Mr. Roman recalled working with and around Taco pumps and valves aboard the USS Lawrence for approximately two years. (Deposition pp. 159-60, 195).

¹ A copy of his deposition transcript is submitted as defendant’s exhibit C (“Deposition”).

In Taco's interrogatory responses submitted on this motion, Taco confirmed that asbestos-containing components were incorporated into its products through 1981 and possibly as late as 1986. However, Taco submits that Mr. Roman failed to demonstrate any evidence that links his diagnosis of mesothelioma to any asbestos fibers released from products manufactured, sold, or distributed by Taco. Specifically, Taco argues that Mr. Roman could not recall whether he was exposed to asbestos from Taco products. Plaintiff responds that his interrogatory responses and deposition testimony establish that he was exposed to asbestos-containing pumps and valves manufactured by Taco while working aboard the USS Lawrence.

DISCUSSION

"It is axiomatic that summary judgment is a drastic remedy which should not be granted where there is any doubt as to the existence of a triable issue of fact . . . or where such issue is even arguable . . ." *Tronlone v Lac d'Amiante Du Quebec*, 297 AD2d 528, 528-29 (1st Dept 2002) (internal citations omitted); *see also Reid v Georgia Pacific Corp.*, 212 AD2d 462, 463 (1st Dept 1995). To obtain summary judgment, the movant must tender sufficient evidentiary proof to establish its cause of action or defense sufficiently to warrant a court's directing judgment in its favor as a matter of law. *See Zuckerman v City of New York*, 49 NY2d 557, 562 (1980). Failure to make such a *prima facie* showing "requires denial of the motion, regardless of the sufficiency of the opposing papers . . ." *Winegrad v New York Univ. Med. Ctr.*, 64 NY2d 851, 853 (1985) (internal citations omitted). "The function of a court entertaining a motion for summary judgment is one of issue finding, not issue determination . . ." *Dollas v W.R. Grace and Co.*, 225 AD2d 319, 321 (1st Dept 1996) (internal citations omitted).

Taco submits that it is entitled to summary judgment because Mr. Roman was only familiar with the Taco name and could not describe any physical characteristics of a Taco pump, i.e., how

the pumps were mounted, or what systems would have been associated with the pumps. In this respect Taco relies in part upon the following testimony (Deposition, pp. 637-38):

Q: Is it your recollection that you encountered Taco pumps on the Lawrence?

A: I don't remember right now.

Q: Okay.

A: I remember seeing the pumps somewhere during the time that I was in the either in the Navy or my service when I worked for the City. But, like, right now I can't, you know, tell you where I saw it exactly.

* * * *

Q: Do you have a specific recollection of ever working with a Taco pump?

A: No recollection right now, but I probably did work with it. Exactly where right now, I can't remember exactly. You know, it's been a lifetime.

However, earlier in his deposition Mr. Roman identified Taco pumps with respect to his service aboard the USS Lawrence (Deposition, p. 195):

Q: Do you know who made the pumps in the forward boiler room that you rebuilt?

* * * *

A: Bell & Gossett. Crane, Aurora, Warrant, Tico [sic] or Taco [sic], whatever it was.

This testimony illustrates that there are issues of fact for the jury to decide because “any conflict between plaintiff’s allegations and the documentary evidence merely presents an issue of credibility for resolution at trial” *Dollas, supra* at 321 (internal citations omitted); *see generally Schachat v Bell Atlantic*, 282 AD2d 329 (1st Dept 2001) (denying summary judgment where there is inconsistent deposition testimony); *Gonzales v Anglebrook Ltd. Partnership*, 280 AD2d 452 (2d Dept 2001) (denying summary judgment where there is contradictory deposition testimony because there is an issue of fact to be determined by the jury).

For the first time in its reply papers, Taco argues that all Taco products sent to the USS Lawrence between 1940 and 1990 were asbestos-free. In support thereof Taco submits an affidavit of Taco’s Technical Services Engineering Supervisor, George Taber, which provides three diagrams of Taco products which purport to substantiate this allegation. (Reply Affirmation, exhibit

G(1)-(3)). The First Department has unequivocally and historically held that “[t]he function of reply papers is to address arguments made in opposition to the position taken by the movant and not to permit the movant to introduce new arguments in support of, or new grounds for the motion” *Dannasch v Bifulco*, 184 AD2d 415, 417 (1st Dept 1992) (internal citations omitted); *see also Kennelly v Mobius Realty Holdings LLC*, 33 AD3d 380, 381 (1st Dept 2006). In this instance, this court may not consider defendant’s reply herein for the purpose of showing *prima facie* entitlement to summary judgment, *see Batista v Santiago*, 25 AD3d 326, 341 (1st Dept 2006), especially where, as here, plaintiff has had “neither the obligation nor opportunity to respond absent express leave of court (CPLR 2214[c] . . .).” *Azzopardi v American Blower Corp.*, 192 AD2d 453, 454 (1st Dept 1993).

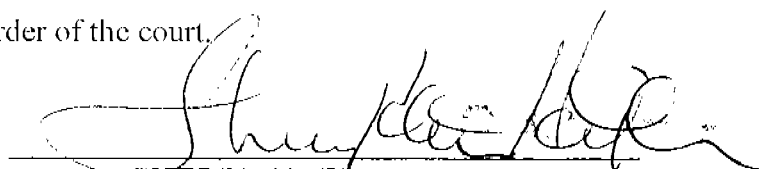
In any event, were this court to consider defendant’s reply, the evidence presented therein does not sufficiently establish that all Taco products sent to the USS Lawrence were asbestos-free. The diagrams supplied in the reply papers are selective insofar as Taco has not provided any work orders or other work records they may have had to confirm such allegation. Moreover, the affiant George Taber began working at Taco after the relevant time period, which raises the issue of his or any other person’s direct knowledge of the facts he has attested to. Under these circumstances, a jury should be given the opportunity to determine whether or not plaintiff was exposed to asbestos from Taco products.

Accordingly, it is hereby

ORDERED that Taco Inc.’s motion for summary judgment is denied in its entirety.

This constitutes the decision and order of the court.

DATED: 7.12.12


 SHERRY KLEIN HEITLER
 J.S.C.